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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE WALLACE LEWIS,

Defendant and Appellant.

C085602

(Super. Ct. No. 17FE001511)

A jury convicted defendant George Wallace Lewis of being a felon in possession of a firearm and ammunition. The jury also found true prior prison term enhancement allegations. The trial court sentenced defendant to five years in prison.

Defendant now contends (1) the trial court should have instructed the jury on possession of a firearm in self-defense, (2) the People did not establish the business records exception to the hearsay rule in seeking to prove defendant's prior prison terms, and (3) the trial court did not articulate reasons for imposing an upper term sentence. Finding no merit in the contentions, we will affirm the judgment.

BACKGROUND

In January 2017, police searched defendant's backpack and found a loaded semiautomatic handgun. Police did not know how long defendant possessed the firearm, but it was not registered to him. Defendant had a prior felony conviction, but in complaining to police about the seizure and arrest, defendant said the following, among other things: "Man, I'm about to fight this shit. I swear to God, I'm suing y'all now, bruh. That's on my mama. I swear to God, dude. I s-, I'm shot. I got shot too in my fucking leg and y'all took my fucking gun. All right, bro. What when I get to this jail, dude. I swear to God I'm fighting this shit, dude. On my mama, I'm mad as fuck now, dude." Defendant added, "Suing the fuck out of y'all. And I want my gun back. It's my shit." An officer replied, "It's not yours." Defendant responded, "Yeah, it is. Why did I have it then? 'Cause I got shot. It's mine. Fuck you mean?"

During trial, defense counsel asked the trial court to instruct the jury pursuant to CALCRIM No. 2514 [possession of firearm by person prohibited by statute: self-defense]. That instruction provides in pertinent part that a defendant is not guilty of unlawful possession of a firearm if he temporarily possessed the firearm in self-defense. (CALCRIM No. 2514) The instruction explains that the defendant possessed the firearm in lawful self-defense if he reasonably believed he was in imminent danger of great bodily injury, he reasonably believed the immediate use of force was necessary to defend against that danger, a firearm became available to him without planning or preparation on his part, he possessed the firearm for no longer than reasonably necessary for self-defense, no other means of avoiding the danger was available, and his use of the firearm was reasonable under the circumstances. (*Ibid.*) The instruction adds that belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be; the defendant must have believed there was imminent danger of great bodily injury. (*Ibid.*)

Defense counsel argued there was sufficient evidence to support the instruction based on defendant's statement to police that he had previously been shot in the leg.

The prosecutor objected, arguing defendant had been shot months earlier and there was no imminent threat. The trial court denied defendant's request for the instruction, stating: "There is no evidence of self-defense, other than him saying he got shot, which is a statement of past -- a past event. He didn't say anything about somebody was just about to shoot me, anything. There is nothing imminent whatsoever."

The jury convicted defendant of being a felon in possession of a firearm and ammunition. (Pen. Code, §§ 29800, subd. (a)(1), 30305, subd. (a)(1).)¹

In a bifurcated jury trial on prior prison term allegations, the prosecutor offered into evidence, as a business record, defendant's section 969b packet from the Department of Corrections and Rehabilitation (CDCR), which included information on defendant's criminal history. To lay a foundation for the CDCR packet, the prosecutor offered the direct testimony of Deputy District Attorney Brad Ng as an expert on reviewing CDCR records. Although defense counsel objected to Ng's testimony about the CDCR packet on grounds of hearsay, the trial court said the statement of the CDCR custodian on the front page of the packet provided sufficient foundation. In that written statement, Diane Shepherd, a Correctional Case Records Analyst, represented that the Director of CDCR is the official legal custodian of the records of prisoners committed to the California state prisons, that the Director authorized Ms. Shepherd to certify on his behalf the criminal records of persons who have served sentences in California state prisons, and that Ms. Shepherd certified that the attached packet is a true and correct copy of the originals in her custody as required by law. The trial court admitted the CDCR packet over defense counsel's objection, and instructed the jury as follows: "The People have alleged that the defendant was previously convicted of another crime. It has already been determined that the defendant is the person named in the exhibits that have been introduced in this portion

¹ Undesignated statutory references are to the Penal Code.

of the trial. You must decide whether the evidence proves whether the defendant was convicted of the alleged crimes.” The jury found true the allegations that defendant had two prior prison terms. (§ 667.5, subd. (b).)

The probation report indicated defendant was not eligible for probation, and it would not recommend probation even if unusual circumstances had existed because defendant’s prior criminal record was significant. It noted multiple circumstances in aggravation, including defendant’s prior violent conduct (Cal. Rules of Court, rule 4.421(b)(1)),² his extensive criminal history (rule 4.421(b)(2)), and his unsatisfactory performance on probation (rule 4.421(b)(5)). There were no identified circumstances in mitigation. (Rule 4.423.) On the count 1 conviction for being a felon in possession of a firearm, the probation report recommended sentencing defendant to the midterm of two years. It recommended staying any imposed term on the count 2 conviction for being a felon in possession of ammunition. And it recommended imposing an additional one year for each of the two prior prison term enhancements. Thus, the probation report recommended an aggregate sentence of four years.

At the August 2017 sentencing hearing, the trial court said it read and considered the probation report and asked counsel for their position regarding sentencing. The prosecutor argued defendant should be sentenced to the upper term of three years on count one, for an aggregate term of five years. The prosecutor noted defendant’s extensive criminal record, his prior crimes of violence, the lack of any mitigating circumstances, and his belligerence on the day of the incident despite him having a loaded gun with a round in the chamber.

Defense counsel urged the middle term on count one, arguing defendant’s criminal record was not extremely lengthy or severe and was primarily when defendant was a

² Undesignated rule references are to the California Rules of Court.

juvenile. His maximum prior sentence was only four years. Defense counsel acknowledged defendant seemed extremely upset when talking to the police, but counsel said defendant had been shot eight months earlier in a drive-by shooting while walking outside his home. Defense counsel said defendant lived in a very dangerous neighborhood and had a gun to feel safe. Although that was not a criminal defense, counsel argued it went to defendant's state of mind and showed he did not have the gun for a criminal purpose. The trial court asked defense counsel to explain the details of defendant's prior domestic violence conviction. Defense counsel said it was a dispute that "ramped up to a physical encounter" with defendant choking the victim and throwing her on a bed.

The trial court sentenced defendant to five years in prison, consisting of the following: the upper term of three years on count one (§ 29800, subd. (a)(1)); eight months (one-third the midterm of two years) on count two (§ 30305, subd. (a)(1)), stayed pursuant to section 654; and two years (one year each) for the prior prison term enhancements (§ 667.5, subd. (b)). In selecting the upper term, the trial court acknowledged defendant's argument that he possessed a gun for protection, but considered that an aggravating factor because defendant forfeited the right to possess a firearm due to his multiple prior felony convictions. The trial court said defendant absolutely knew the restrictions, and the trial court noted defendant's attitude in complaining to the police and in demanding his gun back.

Additional background is included in the discussion as relevant to the contentions on appeal.

DISCUSSION

I

Defendant contends the trial court should have instructed the jury on possession of a firearm in self-defense.

A trial court must only give instructions supported by substantial evidence, and it has the authority to refuse requested instructions on a defense theory for which there is no supporting evidence. (*People v. Larsen* (2012) 205 Cal.App.4th 810, 823.) But here, as the trial court ruled, there is no substantial evidence to support instructing the jury with CALCRIM No. 2514. There is no evidence that defendant reasonably believed he was in imminent danger of great bodily injury, that he reasonably believed the immediate use of force was necessary to defend against that danger, that the firearm became available to him without planning or preparation on his part, that he possessed the firearm for no longer than reasonably necessary for self-defense, that no other means of avoiding the danger was available, or that his use of the firearm was reasonable under the circumstances. (*Ibid.*) Even if there was a likelihood of future harm, that was not sufficient because there was no evidence of imminent danger. (*Ibid.*)

Defendant argues California law must not be interpreted to infringe his Second Amendment right to bear arms. (*District of Columbia v. Heller* (2008) 554 U.S. 570 [171 L.Ed.2d 637]. But as defendant acknowledges, *Heller* said nothing in that opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons. (*Id.* at pp. 626-627; accord, *McDonald v. City of Chicago* (2010) 561 U.S. 742, 786 [177 L.Ed.2d 894, 926] [the right to keep and bear arms is not a right to carry any weapon in any manner for any purpose].)

The trial court did not err in refusing to give the instruction.

II

Defendant next contends the People did not establish the business records exception to the hearsay rule in seeking to prove defendant's prior prison terms. He claims the trial court improperly admitted his section 969b packet because witness Ng did not have personal knowledge of the documents or how they were created.

But we are required to uphold a trial court's ruling if it is correct on any basis, regardless of whether such basis was actually invoked. (*Marriage of Burgess* (1996)

13 Cal.4th 25, 32.) Here, the CDCR packet was admissible under section 969b, which provides: “For the purpose of establishing prima facie evidence of the fact that a person being tried for a crime . . . under the laws of this State has been convicted of an act punishable by imprisonment in a state prison, county jail or city jail of this State, and has served a term therefor in any penal institution, . . . the records or copies of records of any state penitentiary . . . in which such person has been imprisoned, when such records or copies thereof have been certified by the official custodian of such records, may be introduced as such evidence.”

On this record, the cover sheet of the CDCR packet satisfied the foundational requirements for admission.

Defendant argues for the first time on appeal that the trial court also erred in failing to identify defendant as the person in the documents. His argument is forfeited because he failed to assert it in the trial court. (*People v. Belmares* (2003) 106 Cal.App.4th 19, 28.)

III

Defendant further claims the trial court did not articulate reasons for imposing an upper term sentence. Although his argument is subject to forfeiture because he did not object in the trial court, it is also wrong. The trial court explained that defendant’s attitude that he needed a gun was a circumstance in aggravation. It further explained that defendant’s possession of guns was littered through his history, he had been to prison twice, he was carrying a loaded gun with a round in the chamber, and he absolutely knew he had no right to carry a gun. The trial court said that despite those circumstances, defendant demanded his gun back, and that was a reason for locking him up a little longer. The trial court clearly articulated reasons for imposing the upper term sentence.

A trial court is afforded broad discretion in sentencing decisions. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847; see also § 1170, subd. (b).) An upper term sentence may be based on any aggravating circumstance the court deems significant and

reasonably related to the decision being made. (*Sandoval*, at p. 848, quoting rule 4.408(a).) A single valid factor is enough to justify imposition of an aggravated term. (*People v. Black* (2007) 41 Cal.4th 799, 813, overruled on other grounds by *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856].) Here the trial court did not abuse its broad discretion.

DISPOSITION

The judgment is affirmed.

/S/
MAURO, J.

We concur:

/S/
HULL, Acting P. J.

/S/
MURRAY, J.